Whose constitution? Constitutional self-determination and generational change

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Note:
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in three important respects. Firstly, the journal's editor formatted the submitted *anonymised* version and thus all self-identifying footnotes were omitted by accident in the print version. This digital version thus has several additional footnotes.

Secondly, this digital version contains two figures (and related additional paragraphs) that were omitted in the *Ratio Juris* version for reasons of space.

Thirdly, an additional chapter ("7. Defusing the debate on the role of constitutional courts") is part of the digital version but not of the print version.

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Abstract:

Constitutions enshrine the fundamental values of a people and they build a framework for a state's public policy. With regard to generational change, their endurance gives rise to two interlinked concerns: the sovereignty concern and the forgone welfare concern. If constitutions are intergenerational contracts, how (in)flexible should they be? This article discusses perpetual constitutions, sunset constitutions, constitutional reform commissions and constitutional conventions, both historically and analytically. It arrives at the conclusion that very rigid constitutions are incompatible with the principle of intergenerational justice. Recurring constitutional reform commissions in fixed time intervals would give each generation of citizens a say without leaning too much to the side of flexibility.

1. Introduction[1]

From the perspective of the reproduction of political orders, constitutions are an interesting case. Arguably, they are the most important intergenerational contract in modern society. This raises the question of how binding this contract should be: flexible or fixed?

A "constitution" is usually[2] defined as a system of fundamental principles according to which a state is to be governed. Constitutions build a framework for a state's public policy. They enjoy normative priority over ordinary statutes and regulate the manner in which ordinary laws are made. Constitutions also enshrine the fundamental values of a people, often in their preambles or in their first part. They can (but need not) contain a catalogue of basic human rights and liberties. Constitutions are distinguished from ordinary legislation by their rigidity. Written constitutions usually require legislative supermajorities, concurrent majorities of different houses of the legislature, and/or popular referenda in order to be changed.[3] By their very nature, constitutions are intergenerational documents because they are intended to place certain questions beyond the reach of simple majorities, the components of which change frequently. With few exceptions, constitutions are meant to endure for many generations.

In a democracy, the legitimacy of governance is founded on the consent of the governed. All those who are subject to the rule of a constitution should be able to exert influence over the basic laws that regulate their lives. The principle of popular sovereignty stipulates that the demos[4] is the ultimate source of governmental power. As a matter of fact, the demos does not consist of the same

[1] The research question that is outlined in the introduction has been with me for a long time. The answer I have given during my academic life varies. The first part of this article has been formulated in a similar form as here in J. Tremmel (2017): Constitutions as Intergenerational Contracts: Flexible or fixed? In: Intergenerational Justice Review, vol. 3(1), pp. 4-17.

[2] Both "constitution" and "constitutionalism" are contested concepts. For an extended discussion, see e.g. Lutz 2006: 1-25. Grey opens his essay with: "Constitutionalism is one of those concepts, evocative and persuasive in its connotations yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse." (Grey 1979: 189).

[3] In countries without written constitutions, such as the United Kingdom, Israel or Saudi-Arabia, constitutional provisions can, in principle, be changed by ordinary acts of the legislature.

[4] The Greek term "demos" *(*δῆμος) designates the citizenry within a people while the term *ethnos* (ἔθνος) refers to a nation as an ethnic group. Historically, the establishment of demes as fundamental units of the state by Cleisthenes in 508 BC was an important step in the evolution of political order out of kin structures.

persons over time as generations[5] come and go.[6] If constitutions are intergenerational contracts, how flexible or inflexible should they be?[7]

After having given this short introduction into the intergenerational challenge to rigid ("difficult to change") constitutions, this paper proceeds as follows. Paying tribute to the classical beginning of the debate, I start with the Jefferson-Madison dispute at the end of the 18th century, during the incipient constitutionalism in the United States and France. After clarifying my key concepts, I then proceed by describing the two concerns that can be voiced against very rigid constitutions: the sovereignty concern and the forgone welfare concern. After discussing several stylized cases, the intermediary upshot is that only constitutions that are not too difficult to change are compatible with the principle of intergenerational justice. I then discuss five counterarguments, i.e. arguments in favour of constitutional rigidity. I conclude that they are all not entirely wrong, but not as convincing as their rejoinders. I put then forth my proposal for a procedure of constitution-amending, namely that recurring constitutional reform commissions in fixed time intervals strike the best balance between the necessary rigidity and the necessary flexibility of constitutions, thereby fulfilling the requirements of intergenerational justice. In the conclusion, some questions regarding the possible design of these commissions are outlined for further research.

2. The beginning of the debate about perpetual constitutions

The start of the debate on constitution-making and intergenerational justice has an exact date: in a letter to James Madison of 6 September 1789, Thomas Jefferson pondered the problem of intergenerational domination. Jefferson begins his letter with the words: "The question Whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water" (Jefferson 1904, 3). As Jefferson states, the history of political thought until his

[5] Two different meanings of the word "generation" can be distinguished: generations as age groups and generations as ensembles of all people living together at a given point in time. The former can be termed temporal and the latter intertemporal generations (see Tremmel 2009, ch. 2). Thus two kinds of intergenerational justice must be distinguished: "justice between young, middle-aged and old people alive today" (temporal intergenerational justice) and "justice between the present generation (i.e. all people alive today) and future generations" (intertemporal intergenerational justice). Constitutions that are perpetual or very difficult to change present a problem for both kinds of intergenerational justice.

[6] A contemporary account that is oblivious of this empirical fact and sees a demos – in the tradition of Jean-Jacques Rousseau or Carl Schmitt – as a homogenous entity is Muñiz-Fraticelli's (2009). He theorises in the ontological part of his article: "As sovereignty is more than the mere exercise of force, it must be the case that there exists a norm that recognizes legitimate authority in the sovereign. Sovereignty presupposes such a norm; otherwise it is merely the exercise of power without justification. Now, popular sovereignty is the sovereignty of 'the people'; it is not the imposition of the will of the majority of individuals in a certain territory, but the exercise of sovereignty by the people as a whole, as a collective entity. Therefore, for popular government to be intelligible there must exist a norm that grants legitimate authority to this collective agent. While it is true that the norm must have an origin, the sovereign people itself cannot be the source of it; before the norm there is no 'people', but only an individual or group of individuals exercising arbitrary power. In conferring legitimacy to 'the people', the legitimating norm and the democratic sovereign come into being at once" (pp. 401/402).

[7] Otsuka describes the problem of intergenerational sovereignty like this: "[H]ow can one defend the claim that laws enacted by a deceased generation of citizens of country x have any authority over the present generation of citizens of country x?" (Otsuka 2003, 136).

time had been oblivious to generational change. The great theorists of early modern times laid the foundations for the first acts of constitution-making in France and the USA by devising the eminent thought experiment of the evolvement of state authority out of a state of nature by a social contract. But for Hobbes, Locke, Montesquieu, Rousseau and Kant the exit from the state of nature and the entry into a social contract was a singular act, not an act that each generation had to repeat.[8] Some accounts, such as Rousseau's *Contrat Social*, conceived of the demos as a homogenous entity both synchronically and diachronically. But even those that did not conceive of a people as a homogenous entity synchronically – for instance Hobbes, who acknowledges in the *Leviathan* that there are different factions at one point of time – conceived of a people as one homogenous entity diachronically. Therefore Jefferson's contribution to the history of political thought can hardly be overstated. From a discussion of public debt, he switched to laws and constitutions: "On similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. [...] The constitution and the laws of their predecessors extinguished them, in their natural course, with those whose will gave them being. [...] Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right" (Jefferson 1904, 8-9).

Jefferson proposes in this letter that constitutions should have a set expiration date. In his reply letter, of 4 February 1790, Madison dissented and pointed at the instability that would ensue. Madison's objections were mainly of a practical nature:[9] "Would not a Government ceasing of necessity at the end of a given term, unless prolonged by some Constitutional Act, previous to its expiration, be too subject to the casualty and consequences of an interregnum? [...] Would not such a periodical revision engender pernicious factions that might not otherwise come into existence; and agitate the public mind more frequently and more violently than might be expedient? [...] I can find no relief from such embarrassments but in the received doctrine that a *tacit* assent may be given to established Governments & laws, and that this assent is to be inferred from the omission of an express revocation" (Madison 1904, 438–40; italics in original).

The US constitution that came into force in 1789/1791 did not become a sunset constitution. On the contrary, it became a constitution that is notoriously difficult to change. Arguably, Jefferson's extreme proposal of a sunset constitution prompted this harsh counter-reaction. Jefferson was in Paris during the oftentimes bitter 1787–91 battle over ratification of the US Constitution (including the Bill of Rights), but Madison was very present in Philadelphia, masterminding quite the opposite

[8] In John Locke's *Second Treatise of Government,* generational change is discussed to some extent, but from a different angle. With regard to the family level, Locke writes: "[W]hatever engagements or promises any one made for himself, he is under the obligation of them, but cannot bind the children or posterity. For his son, when a man, being altogether as free as the father, any act of the father can no more give away the liberty of the son than it can of anybody else" (Locke 1823, Essay Two, chap. VIII, § 116, p. 156).

[9] In one theoretical remark, Madison raises the "lost generation" objection. In short, this is the complaint that those adolescents lucky enough to become enfranchised immediately before the end of Jefferson's nineteen-year-long electoral cycle have almost nineteen more years of political participation than those who come of age immediately *after* the next electoral cycle has begun. The "lost generation" objection must be put in perspective: What is preferable: to have one lost generation, or to have many lost generations? Secondly, a similar problem, albeit on a smaller scale, arises with a system of elections every four or five years, as is commonplace. And thirdly, the "disenfranchised youth objection" (as it should be called more precisely) is somewhat overstated because babies, little children and younger adolescents have no interest in political participation anyway. For those minors who do wish to participate, a remedy would be a flexible voting age as proposed by Tremmel and Wilhelm (2015).

of Jefferson's proposal.[10] An almost impermeable article 5 was included in the US constitution when it was drafted, and this article remains unchanged until the present day.[11]

3. Clarification of the key concepts

3.1 "Perpetual" and "endurance-by-default" constitutions

Having an adequate terminology is essential, and not every account is helpful here. In his otherwise thoughtful paper *The Problem of a Perpetual Constitution*, Victor Muñiz-Fraticelli (2009, 377) writes: "A perpetual constitution has no 'sunset clause', no date of expiration; it *may* [my emphasis] contemplate for its amendment and even specify a procedure for its modification, but it does not consider its own abolition. When adopted, it is intended to govern a society for as long as that society exists, and to be accepted by the present and future members of that society as a valid charter of political association." The problem with this definition is that the modal verb "may" renders it inadequate. Its extension encompasses both constitutions that cannot be changed for an indefinite future *and* constitutions that can be amended by (super)majority vote at any time. Muñiz-Fraticelli's terminology forces him to speak of "a constitution sufficiently perpetual" (p. 390: fn. 26), which is a contradiction in terms since "perpetuity" is not a gradual concept. Muñiz-Fraticelli's terminology is inadequate because it implies that every constitution that is not a sunset constitution is by definition a perpetual constitution. But, as this paper will show, it is important to be able to distinguish terminologically a "perpetual constitution" from an "endurance-by-default constitution" that has cumbersome amendment procedures. In comparison to ordinary laws, all constitutions are difficult to change, but this does not make them "perpetual" in the usual sense of the word ("eternal", "everlasting" or "perennial").

I define the concepts that are used in this article as follows:

a) **Sunset constitution:** A constitution that lapses automatically after a fixed time span. (The analogue of this on the level of a single clause would be a "sunset clause".)

b) **Perpetual constitution:** A constitution that does not allow for amendment, repeal or replacement. (The analogue of this on the level of a single clause would be an "irrevocable clause", i.e. a clause in a constitution that is not alterable by the constitutional amendment procedures enshrined within the constitutional text.)

[10] At „the other side of the water", the events evolved quite differently. The right of a people to reform their constitution was a key element in the Girondin constitutional project. Article 28 of the draft of the French Constitution of 1793 stated: "A people always has the right to review, reform, and change its constitution. One generation may not subject future generations to its laws." But this constitution was invalidated during the so-called "Reign of Terror" in the French Revolution. In the Thermidorian Reaction, it was discarded in favour of a more conservative document, the Constitution of 1795.

[11] Article 5 of the US Constitution reads: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

c) **Endurance-by-default constitution:** A constitution that endures by default in the sense that unless objection to it receives a certain level of political support, the constitution will endure. (The analogue of this on the level of a single clause would be an "endurance-by-default clause".)

d) **Difficult-to-change constitution:** A constitution with an onerous or rigid change mechanism, for instance three-quarter majorities in two different legislative chambers, or concurrent votes of two different legislatures with an intervening election between these votes.

3.2 Irrevocable clauses as the small brothers of perpetual constitutions

There is not (and never has been in the history of man-made constitutions) a perpetual constitution anywhere in the world. This is the upshot of a study of hundreds of historic and current constitutions by legal scholar Yaniv Roznai who summarizes: "Treating the *entire* [my emphasis] constitution as unamendable derives either from ascribing it to a superhuman source, or from the constitution-maker being afflicted with exceptional arrogance and belief that he has achieved the apex of perfection" (Roznai 2015, 3). However, there are unalterable provisions *within* endurance-by-default constitutions. While there is some ambiguity in the literature about the best nomenclature, in this article the provisions that are sheltered from alteration or repeal are termed "irrevocable provisions" [12] What makes them "irrevocable" is that no measure of legislative or popular approval – not even unanimity among all institutions of the state in concert with the freely expressed wishes of the citizenry – are sufficient to ever change them (cf. Albert 2000, 672). Entrenching clauses are the little brother of perpetual constitutions. In the 735 past and present constitutions that Roznai examined, 28% include or included entrenching clauses (Roznai 2015, 8).[13] If one believed that first and foremost basic rights and liberties (as far as they are part of constitutions) are candidates for irrevocable clauses, one is mistaken. In the constitutions that are or were in effect after World War II, less than 30% referred to basic rights. The system of government is more often the subject of irrevocable clauses than anything else. While more than 100 constitutions protect the republican form of a government, some protect a monarchy. This is especially the case in some of the Arab countries [14] but also for instance in the Grand Duchy of Luxembourg, a member state of the EU.[15] The second notable group is protecting the state's political or governmental structure, such as federal or unitary, for instance, or presidential or parliamentarian (Roznai 2015, 11).

[12] In his paper *Constitutional Handcuffs*, Richard Albert points to the ambiguity in the literature about irrevocable and entrenching clauses. Most scholars correctly distinguish between the two types of clauses but use a variety of names for both: eternity clauses, unamendable clauses (or nonamendable clauses), perpetuity clauses, prohibitory clauses, and so on. Albert cites 15 papers to show that there is no consensus in the scientific community of legal theorists yet on how these clauses should be best named (Albert 2010, 665).
I deem at least the term "unamendable provisions" inadequate as it ignores the difference between a change to and an amendment of a constitution. An "amendment" in the Anglo-Saxon tradition is subsidiary to the original text. Amendments can nullify provisions in the original text, but they do not change the text; they merely add to it. In the US constitution, even amendments such as the 18th (prohibition), which are repealed (by the 21st), remain in the text. In contrast, in those parts of the world where constitutions are "changed" and not "amended", the original text is reworked to incorporate the intended change of its content.

[13] These numbers include those multiple constitutions of the same state.

[14] See for instance the constitutions of Bahrain (1973), art. 120(c); Jordan (1952), art. 126(2); Libya (1951), art. 197; Qatar (2004), art. 145; Kuwait (1962), part V, art. 175; and Morocco (1992), art. 100.

[15] Luxembourg Const. (1868, rev. 2009), art. 115: "During a regency, no change can be made to the Constitution concerning the constitutional prerogatives of the Grand Duke, his status as well as the order of succession" (quoted from the translation available in the Constitute Project database at constituteproject.org; subsequent constitutional provisions will also be quoted from the same source).

Irrevocable clauses is one (but by no means the only possible) way to make a constitution rigid, and this sample was fleshed out to illustrate the generic concept of "(very) difficult to change constitutions". These constitutions give rise to two concerns: the sovereignty concern and the forgone welfare concern.

4. The interlinked sovereignty and forgone welfare concern

With regard to constitutionalism, a short, yet sufficiently broad definition of "generational sovereignty" is: "A generation can be called sovereign if it has a realistic chance to live under constitutional provisions of their own choosing." [16] The concern here is that onerous amendment procedures, such as entrenching clauses, unless related to undisputable human rights,[17] undermine the participatory values that give constitution-making its meaning. Highly-esteemed values such as "the rule of the people" or "popular sovereignty" arguably become meaningless if the present *demos* cannot change certain constitutional clauses for the simple reason that their forefathers wanted to leave an immovable imprint in history.

"Welfare" means here the measurable living conditions of the people in the constitutionalised country. Constitutions are important governance mechanisms that have, to a certain extent, more or less positive effects on the wellbeing of the people who live under their jurisdiction. Welfare is meant here not as an evaluative but as a descriptive concept. While constitutional provisions, when adopted, are usually aimed at fostering the welfare of a people, some constitutional provisions may over time become, in fact, detrimental to a people's long-term well-being, or at least they will lead to forgone welfare.[18] This may be termed the "forgone welfare concern".

The sovereignty concern and the forgone welfare concern are related to each other in the following possible ways:

1) A people lives under the jurisdiction of a "very difficult to change" constitution that was established long ago. All of the constitution's provisions in fact foster their welfare but the citizens are under the false impression that they do not. The citizens thus want to change/repeal/add one or several provisions. But the rigidity of the constitution does not allow for them to do so.

2) A people lives under the jurisdiction of a "very difficult to change" constitution that was established long ago. The citizens are under the impression that all of their constitution's provisions

[16] Gosseries' (2016, 101) broader concept of "jurisdictional generational sovereignty" reads as follows: "A generation is jurisdictionally sovereign during its period of existence to the extent that it is free from enforceable extra-generational jurisdictional claims made by other generations willing to impose their own rules." Both definitions, Gosseries' longer and my shorter one, are congruent in asserting that "generational sovereignty" has different connotations and implications than "state sovereignty" (a concept that is not discussed any further here).

[17] The question whether or not basic human rights should be understood as moral truths, and therefore be entrenched in national constitutions, would justify an article of its own.

[18] Arguably, the Second Amendment to the United States constitution is a case in point. It protects the right of citizens to keep and bear arms ("a well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.") Comparative studies have shown that the percentage of people killed in gun incidents is much higher in the US than in culturally similar countries where citizens do not have a constitutional right to bear arms, such as Canada. Arguably, if the Second Amendment were abolished, the death toll of the present and all succeeding generations of US citizens could be reduced.

foster their welfare, which in fact they do. The citizens don't want to change/repeal/add any single provision. The rigidity of this constitution would not have allowed for them to do so anyway.

3) A people lives under the jurisdiction of a "very difficult to change" constitution that was established long ago. One or more of the constitution's provisions do in fact impair their potential welfare, and the citizens recognise this fact. The citizens thus want to change/repeal/add one or several provisions. But the rigidity of the constitution does not allow for them to do so.

4) A people lives under the jurisdiction of a "very difficult to change" constitution that was established long ago. One or more of the constitution's provisions in fact impair their potential welfare but the citizens don't recognise this fact. The citizens don't want to change/repeal/add any single provision. The rigidity of this constitution would not have allowed for them to do so anyway.

These four cases can be depicted in the following matrix.

Table 1: Trade-offs between welfare and sovereignty under the jurisdiction of a "very-difficult-to-change" constitution

	Citizens want reform	**Citizens don't want reform**
Constitutional clauses in question foster welfare	1) "disimprovement" situation; possible trade-off	2) reasonableness of present citizenry; no trade-off
Constitution clauses in question impair welfare	3) reasonableness of present citizenry; no trade-off	4) unsuspecting immaturity situation; trade-off

The sovereignty concern applies to all four cases, but to a different extent. The least problematic is case 2. Is generational sovereignty impaired here at all? Take the individual counterpart to this question: Is your freedom restrained if you are not free to do what you don't want to do – and should not be doing anyway? There is no real trade-off between sovereignty and welfare here.

In case 3, there are good reasons to wish for a reform of constitutional provisions since they impair welfare, but the people are incapable of doing so because a previous generation decided otherwise over their heads. Here, there is no trade-off between the pursuit of welfare and the pursuit of sovereignty since the citizen's project – if it were successful – would implement both. This is the case for constitutional flexibility.

Case 1, the "disimprovement situation", seems to be the case for constitutional paternalism.[19] But it is necessary to distinguish the inter- from the intragenerational context here. In an intragenerational context, a generation can commit itself in a "sober" state to certain rules. The aim is to prevent itself from actions in a "drunken" state that it will regret when "sober" again. The story of Ulysses and the Sirens is seen as the archetype of such practice. He has his companions tie him to the ship's mast in

[19] To evaluate case 1, it makes sense to draw on the distinction between autonomy and freedom as is familiar on the level of an individual. The Greek etymology of the word "autonomy" means "one's own law". On the level of a demos, autonomy refers to self-governance, i.e. a country's ability to determine its own affairs and to make decisions according to reasonable principles. "Freedom", on the other hand, includes the capacity to override these reasoned decisions, by following one's passions. It seems to me that "sovereignty" is, semantically speaking, more closely connected to "autonomy" than to freedom. Thus, in case 1 it is primarily a people's freedom that is restrained by the constitution, not their sovereignty/autonomy. It goes without saying that definitions of "autonomy" and "freedom" are manifold, see e.g. Schneewind 1988; Raz 1988.

order to be able to listen to the Sirens without falling for their call.[20] Now, as long as each generation decides *intra*generationally that it wants to be tied to the ship's mast, there is no *inter*generational sovereignty concern. But the autonomy of an earlier generation must not turn into heteronomy of the latter. Unlike in Ulysses's case, constitutional chains (very rigid mechanisms for changing a constitution in general and entrenching clauses in particular) are not self-imposed in case 1.

Finally case 4, the unsuspecting immaturity situation: if the citizenship as a whole (as the premises have it) is happy with suboptimal constitutional clauses, then their freedom is not infringed upon. Nevertheless, they forgo welfare. Paternalism, this time a reformist vein, could be justified. But to impose on a people paternalistically a new, and better, constitution against their will is quite hard to do – unless the country collapses after a war and the benevolent victor bestows a good constitution on it.

5. Five arguments in favour of "(very) difficult to change" constitutions

There can be no doubt: constitutions are great inventions in the history of humankind. But this in itself does not defend "very difficult to change" constitutions. Are they defendable at all? Here are some arguments that have been brought forward on their behalf:

5.1) When constitutions entrench democratic rules and fundamental rights against their abolition, they make it more likely for succeeding generations to live under those rules and to enjoy these rights and liberties. Constitutions are thus devices to ensure intergenerational justice.[21]

It is certainly true that fundamental rights and liberties are a boon for present and future individuals. Fundamental rights are not only enshrined in international documents such as the *United Nations Declaration of Human Rights* or the *European Convention for the Protection of Human Rights and Fundamental Freedoms* but, selectively, also in national constitutions.[22] One of these fundamental rights in a number of constitutions, for instance the American one, is the right to freely exercise one's religion. Freedom of religion implies that there is no state religion, since a religion imposed by a government would discriminate against both citizens of a different faith and citizens who are agnostics or atheists. According to the devotees of very rigid constitutions, the fact that freedom of religion is enshrined "in constitutions" seems to support the conjecture that national constitutions are defenders of human rights. But the debate is usually led with a parochial bias: the constitutions of some Western states feature very prominently in it, but then the derived conclusion (namely, that only cumbersome procedures of constitution-amending are intergenerationally just) is more or less generalized to *all* constitutions of the world. Based on some single-case studies of Western constitutions, it is concluded that rigid constitutions per se are beneficial. It should not go unnoticed that 96% of national states today have a constitution (Rasch/Congleton 2006, 340). But of all states,

[20] Elster (2000) uses Ulysses's case to lay out a fully articulated constraint theory. See also Chatziathanasiou 2017.

[21] Muñiz-Fraticelli (2009, 402): "Overwhelmingly, future generations are the beneficiaries, not the victims, of a constitution enacted by their predecessors."

[22] Historically, the first guarantors of human rights were states (guaranteeing rights for their respective citizens), but international treaties today play an equal, if not more important role in protecting human rights.

only 11.4% (home to only 4.5% of the world population) can be classified as "full democracies".[23] Taking a global view, one cannot ignore the fact that almost all semi-democratic and authoritarian states are constitutionalised states. Ignore the West, and the relation between constitutionalism and democracy is quite different from that depicted in textbooks, which usually state that constitutions are a tool to limit governmental power. When constitutional provisions protect the rights of a monarch, the principle of inherited rules and succession to the throne, they serve as a mechanism to preserve the existing power of the rulers rather than to limit it (cf. Roznai 2015, 15).

In many authoritarian settings, constitutions protect the political order without protecting human rights and liberties. Some constitutional clauses are directly disjunctive to fundamental human rights. For instance: several constitutions in Islamic countries enshrine the primacy of Islam, sometimes even with entrenching provisions.[24] By fusing religion into the branches of government, these constitutional clauses defy the principle of religious freedom and thus contradict that particular basic human right. Yet these examples are often ignored when legal scholars assert that constitutions are defenders of human rights and liberties. With regard to international comparisons, it is high time that the mainstream focused more on constitutionalism in authoritarian settings (notable exceptions are Dowdle/Willkinson 2017; Ginsburg/Simpser 2014; Svolik 2012; Brown 2001).

5.2) It is a good thing that constitutions shield certain matters from capricious everyday politics. Contentious issues must be silenced at some point in order to secure peaceful co-operation and fellowship among all citizens.[25]

Usually, democratic societies do not shy away from debate and deliberation.[26] Participatory democracy even aims at involving people actively in politics. Therefore, the burden of proof lies with those who argue in favour of the avoidance of open debates. I don't rule out the possibility that their arguments might prevail under exceptional circumstances. But for these extraordinary cases, one could justify *temporal* irrevocability, but not *permanent* irrevocability.[27] This would allow the removal of the contentious issue from the public agenda for a while without long-term restraints.
I also concede that the "silencing argument" is convincing enough to counsel against constitutional reform commissions that are established at very short intervals, e.g. every five years or so, but not against recurring commissions every 25 years or so. Once within a whole generational cycle, the

[23] According to the "Democracy Index" 11.4% of all countries are "full democracies" and another 34.1% are "flawed democracies"; see Economist Intelligence Unit 2016. Of course, "democracy" is a highly contested concept. For a different definition of the term, and thus a different count, see Bertelsmann Stiftung 2016.
[24] Iran, Algeria and Afghanistan use irrevocable provisions to make it impossible for all succeeding generations to disestablish Islam as a state religion.
[25] Madison elaborated on this point in the *Federalist Papers*, No. 49. We should "recollect," he says, "that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord."
[26] According to Roznai (2015, 22) it is a risky strategy to use constitutions as "gag devices" since "whatever is silenced might explode in the future." See also Holmes 1993, 19.
[27] Temporal irrevocability has been employed for instance in Kuwait where article 174 of the constitution (reinstated in 1992) prohibited amendments within five years: "A proposal for the amendment of this Constitution shall not be permissible before the lapse of five years from the date of its coming into force." Similar irrevocability formulae can be found in the constitution of Qatar, art. 148 (embargo clause for 10 years) and Greece, article 110(6) (for 5 years). More sophisticated are temporal irrevocability clauses that can be overruled by an exceptionally high legislative supermajority. See, for instance, Article 284 of the constitution of Portugal: "The Assembly of the Republic may revise the Constitution five years after the date of publication of the last ordinary revision law. However, by a four-fifths majority of all the Members in full exercise of their office, the Assembly of the Republic may take extraordinary revision powers at any time."

"risk" of high public engagement and fierce debates seems bearable. Moreover, as long as the debated question is it not "this constitution, or an alternative" but just single provisions of the constitution in place, the conflict will be manageable.
Veneration for constitutions (and constitution-making events) should not obscure the fact that each constitution is man-made. Drawing on the common division between polity, policy and politics, constitutions are usually regarded as part of *polity*. This view neglects that constitutions (like all other political institutions) are "clotted" *politics*. Before they came into existence, politicking happened. As Pitkin (1987, 168) writes: "[C]onstitutions are *made*, not found. They do not fall miraculously from the sky or grow naturally on the vine; they are human creations, products of convention, choice, the specific history of a particular people, and (almost always) a political struggle in which some win and others lose."

5.3) No long-term private investment of time and capital will occur if there is no reasonable certainty of reaping its reward. Constitutions may reduce uncertainty – assuring for instance, the performance of contracts and securing the rights to property. A system in which the constitution and the laws are self-expiring or too easy to change will increase uncertainty about the future and undercut most long-term private investments.

The endurance of a constitution must not be equated with the endurance of ordinary laws. Even though laws have a more modest claim than constitutions, their longevity (at least in some areas) is often greater. France, for instance, has seen no less than 15 constitutions come and go, yet the French Code Civil of 1805 has endured unaltered "[w]hether the French government has been imperial, republican, or fascist" (Elkins/Ginsburg/Melton 2009, 76). The same is true, by analogy, of the *Bürgerliches Gesetzbuch* in Germany, which came into effect on 1 January 1900.

5.4) No difficult-to-change constitution, however constructed, can survive revolution. Even a constitution full of irrevocable clauses will be swept away if a new generation wants to replace it.

"Institutions are sticky, and constitutions are the stickiest of them" (ibid, 3). Nevertheless, in parts of the literature, the significance of this stickiness is sometimes played down. It is sometimes light-heartedly asserted that succeeding generations are always free to abandon the constitutional order they inherited – by means of a revolution. From this, the conclusion is drawn that there is no intergenerational injustice in including irrevocable (or almost irrevocable) content in constitutions. But this is the most cynical argument of all, since it devalues human lives. Historically, revolutions were often followed by periods of unrest and civil war, and they usually brought about a massive loss of well-being for a large share of the population. There should be easier ways for succeeding generations to get rid of an outdated constitutional legacy.

Iran might be a modern case in point. The irrevocability of some key provisions[28] makes it very difficult for the succeeding generations in Iran to get rid of any of the illiberal provisions of their constitution of 1979. When "their" constitution was enacted almost 40 years ago, the majority of the people living in this country today were not even born. Now the youth has the choice between the devil and the deep blue sea. A revolution would give them the opportunity to replace the Iranian

[28] Article 177 (of the revised constitution) states: "The contents of the Articles of the Constitution related to the Islamic character of the political system; the basis of all the rules and regulations according to Islamic criteria; the religious footing; the objectives of the Islamic Republic of Iran; the democratic character of the government; the wilayat al-'mr; the Imamate of Ummah; and the administration of the affairs of the country based on national referenda, official religion of Iran [Islam] and the school [Twelver Ja'fari] are unalterable."

constitution, but during a revolution many Iranians could lose their lives in prisons and be tortured and killed. In fact, starting in 2009, Iran was repeatedly the scene of vigorous youth revolts. Millions of young people took to the streets when waging the so-called Green Revolution against the rigged election of Ahmadinejad and soon against the whole illiberal theocratic political system that is protected by the present constitution. And the outcome? The subsequent youth revolutions were repressed with sheer brutality, and failed to change the political system.

5.5) There are more checks and balances against short-term passions in older constitutions.

Since Madison, the defenders of very rigid constitutions have been arguing that their content must be protected against changes by successive generations that are motived by irrationality and presentism. The resounding assertion that later generations will pander to their "passions" and short-term interests can be countered by pointing at an interesting development in constitution-amending worldwide. The growing sense of a responsibility for succeeding generations, arguably a moral progress, has materialised in constitutional clauses, especially when constitutions were not too difficult to change. Many constitutions which have been adopted or amended in the last few decades address the aim of long-term thinking by referring specifically to the rights of future people or the duties of today's citizenry towards posterity. These newly inserted clauses may be termed "posterity protection provisions" (PPP).[29] Thematically, most of these clauses fall into one of the following three categories: general PPPs, ecological PPPs and financial PPPs (Tremmel 2006, 190; 2009, 57). Examples for financial PPPs are the "debt brakes" recently adopted by several European countries. The constitution of Poland, for instance, limits the level of national public debt to three-fifths of GDP.[30] Even more frequently, environmental PPPs have seen the light of day. Using the new Constitute Project's database, Dirth (2018) has scrutinized environmental posterity protection provisions and more general provisions about sustainable development in all the constitutions of the world. She found that 120 countries' constitutions make some reference to this. She categorized these provisions into a) individual rights to a healthy environment (74 cases), b) non-binding environmental clauses (58), c) explicit mention of future generations (37), d) explicit mention of the *right* of future generations to the environment (7)[31], e) more elaborate legal provisions (33), f) clauses enabling further legal or policy frameworks to develop (46), and finally g) citizens' responsibility clauses (59). Most of the environmental PPPs are enshrined as individual rights; this follows the rationale that protecting the environment for today's generations is also good for future generations. Some others are enshrined as statements of public policy, often in preambles, and hence function as a guide for public policy-making. These environmental PPPs formulate an obligation of the state, as they are based on the assumption that there is a potential conflict of interests between present and future generations because of the fact that today's generations can benefit by burdening future generations. These provisions usually mention future generations explicitly and underline the state's responsibility to them.

[29] Clauses that are designed only for the purpose of protecting future generations and their respective interests are termed "intergenerational constitutional provisions" by González-Ricoy (2016b) and "posterity provisions" by Ekeli (2007). But I think these two terms are ambiguous, since basically *all* clauses of a constitution reach into the future and are thus in a certain way "intergenerational" or "related to posterity". Therefore, I deem "posterity protection provisions" a clearer term for this very special kind of clause.

[30] Constitution of Poland (1997), art. 216 IV.

[31] Art. L 110 b Const. of Norway, of 1992; art. 7 Bolivian Const., of 2002; art. 35 Const. of Morocco, of 2011; art. 39 Const. of Angola, of 2010; art. 32 of the Const. of Egypt, of 2014; art. 13 Const. of Malawi, of 1994 and art. 50 Const. of Iran, of 1979.

The literature on PPPs, especially those that constitutionalise "green rights", is abundant.[32] The important point for our context is that most of these clauses have been adopted just recently. Cho and Pedersen mention a time span of 25 to 30 years,[33] which is roughly equivalent to the time span in which the vulnerability of the environment came to the fore in public and scientific debate. Dirth (2018, 49) also mentions this time-related point: "Firstly, there are more examples of constitutions from newer states, and these examples tend to include greater levels of detail and more legally enforceable rights and language." This contradicts the hypothesis that there is more rationality and more foresight in older constitutions. It refutes the claim of the proponents of perpetual or "difficult-to-change" constitutions that the succeeding generations will give more leeway to passion than to wisdom in "their" rounds of constitutionalism.

Paternalistic constitution-making rests on the assumption that the framers of a constitution are in a position to identify and represent the general interest – forever. It was shown in the section above that this assumption does not hold, either theoretically or empirically. It is extremely unlikely that the interests and preferences of a group of contemporary adults[34] can be better identified by their forefathers than by the affected group itself. The paternalistic conception that men understand women's needs better than women themselves was successfully rejected by women during their long battle for the right to vote. Unlike the founding fathers of the American constitution, we reject the idea that the interests of Afro-American slaves could be adequately represented by their white masters. That citizens themselves best understand their own interests is a generally accepted principle in contemporary political theory for sound reasons.

A framers' generation should be aware of their own fallibility. It is nothing less than hubris for a generation to pretend to be able to determine which institutions will be the most appropriate for a future they cannot know.[35] The future is unknown to every present generation. New worldwide trends that give rise to the need for reform of the constitutional state can come to the fore anytime (cf. Häberle 2000, 84-6). Take for instance the ecological crisis. Prompted by humanity's unprecedented ability to influence its geophysical surroundings, scientists have recently begun to

[32] Brandl and Bungert 1992; Cho and Pedersen 2013; Dirth 2018; Ekeli 2007; Gonzalez-Ricoy 2016a and 2016b; Hayward 2005; Hiskes 2009; MacKenzie 2016; May and Daly 2014; Tremmel 2006; Weiss 1989.

[33] Cho/Pedersen 2013: 435. Some dates for the insertion of such provisions: Estonia 1992 (preamble); Czech Republic 1992 (preamble and art. 7); Poland 1997 (preamble and art. 74); Switzerland (preamble and art. 73) 1999/2002; Ukraine 1996 (preamble); Argentina 1994 (art. 41); Brazil 1988 (art. 225); Finland 1999 (art. 20); Germany 1994 (art. 20a); France 2004 (Charter for the environment); Hungary 1989 (art. 15); Netherlands 1987 (art. 21); Latvia 1998 (art. 115); Lithuania 1992 (art. 54); Portugal 1976 (art. 66); Slovakia 1992 (art. 44); Slovenia 1991 (art. 72); South Africa 1994 (art. 24); Spain 1978 (art. 45); Sweden 1976 (art. 1); Uruguay 2004 (art. 47); Bolivia 2002 (art. 7); Norway 1992 (L 110 b) etc. One hardly finds any PPPs in constitutions that were adopted before the Second World War.

[34] Paternalism with regard to children is a different issue that is not discussed here.

[35] The Second amendment of the US Constitution is a case in point: With changing circumstances and technological advances the impact of the Second Amendment has altered dramatically over time: a muzzle-loading musket is not the same as an AK-47 assault rifle, after all. The Second Amendment is also a case in point against the hope that the doctrine of a "living constitution" as proclaimed by scholars like David Strauss (2010) will soon materialise in the USA. The US Supreme Court has *not* taken into account changing values and circumstances when interpreting key constitutional phrases. In *District of Columbia v. Heller* (2008), the Supreme Court handed down a landmark decision holding that the Second Amendment protects an *individual right* to possess and carry firearms. In *McDonald v. Chicago* (2010), the court clarified its earlier decisions that limited the amendment's impact to a restriction on the federal government. In *Caetano v. Massachusetts* (2016), the court reiterated its earlier rulings that the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding, and that its protection is not limited to only those weapons useful in warfare.

speak of the beginning of a new geological period, the Anthropocene.[36] The conditions in which people live now in the Anthropocene are, in fact, very different to those of the Holocene.

If one generation entrenches irrevocably rules and systems of government, they mistrust the sense of judgement of their successors. But why should a father mistrust his adult son? Why a mother her adult daughter? Under the shared premise of all generations that the future is insecure, every framers' generation should *offer* a constitutional content to its successors, not try to force it upon its children and grandchildren.

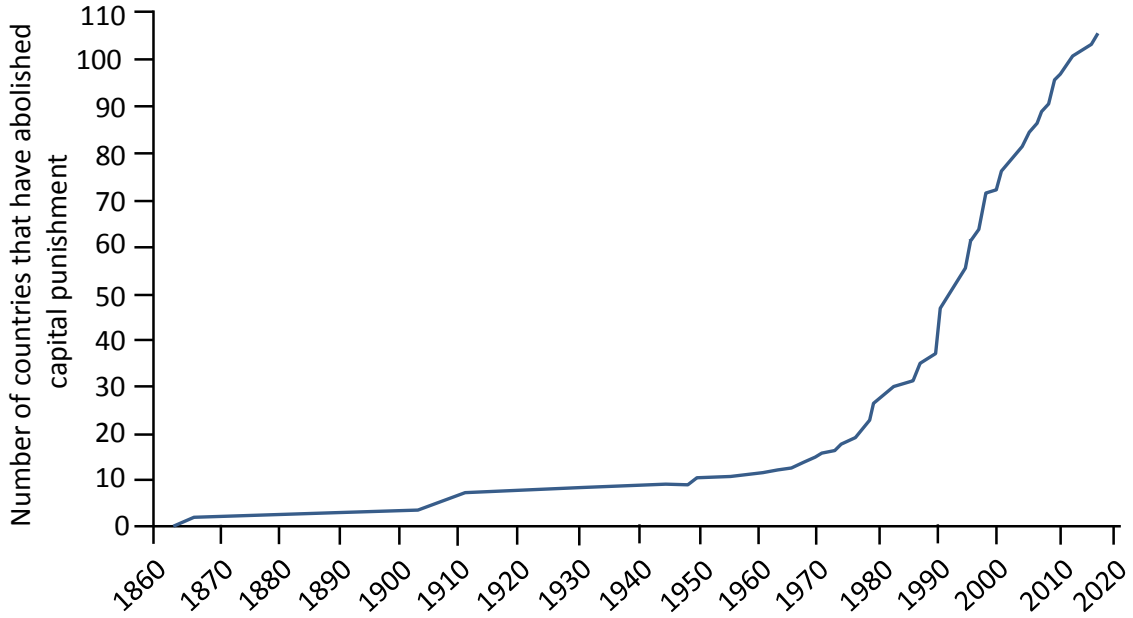
Similar to changing circumstances, a change in the values of a people can justify a revision of a constitution. What can be said about value change generally – that is, not with regard to a specific people, but about all peoples? If all men were angels, then maybe constitutions would be unnecessary at all.[37] Men are no angels and will never be. While there is no consensus as to whether or not humankind has progressed morally since ancient times, some theorists do see some kind of moral progress at work (e.g. Singer 2011; Pinker 2018). If they are right, the idea of paternalism loses further ground. Jefferson himself expressed his belief in the progress of the human mind in a letter to Samuel Kercheval dated 12 July 1816:

"I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand *with the progress of the human mind* [my emphasis]. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times" (Jefferson 1905, 11–2; emphasis mine).

Moral progress might be expected to materialise in constitutional evolvement, unless stunted by onerous constitution-amending mechanisms. The insertion of PPPs in constitutions can be regarded as a sign of moral progress, since these provisions are guided by an impartial concern for the common good in the long term.
Recently, Steven Pinker (2018) has compiled remarkable data on the thesis of moral progress. One of his examples is the abolition of state death penalty.[38] Capital punishment was once applied to hundreds of misdemeanours in gruesome, public spectacles of torture and humiliation. After the Enlightenment, this extreme form of violence by the state against its citizens was abolished for all but the most serious crimes in European countries. When the Universal Declaration of Human Rights inaugurated a second humanitarian revolution 70 years ago, capital punishment was abolished in several countries altogether, especially after the 1970ies, as figure 1 shows. Moreover, while many countries retain capital punishment in their law books, less than a fifth of all nations actually continue to execute people.

[36] The term 'anthropocene' was coined by the ecologist Eugene F. Stoermer and effectively elaborated on by the climate researcher and Nobel Prize winner Paul Crutzen. At the 35th International Geological Congress in Cape Town (September 2016), the members of the subcommission voted almost unanimously in favor of changing the classification of geological epochs and of declaring a new world age – the Anthropocene.
[37] Cf. Federalist Paper no. 51: "If men were angels, no government would be necessary."
[38] Pinker 2018, part II (progress), chapter 14 (democracy).

Figure 1: Death penalty abolitions, 1863–2016 (number of countries).



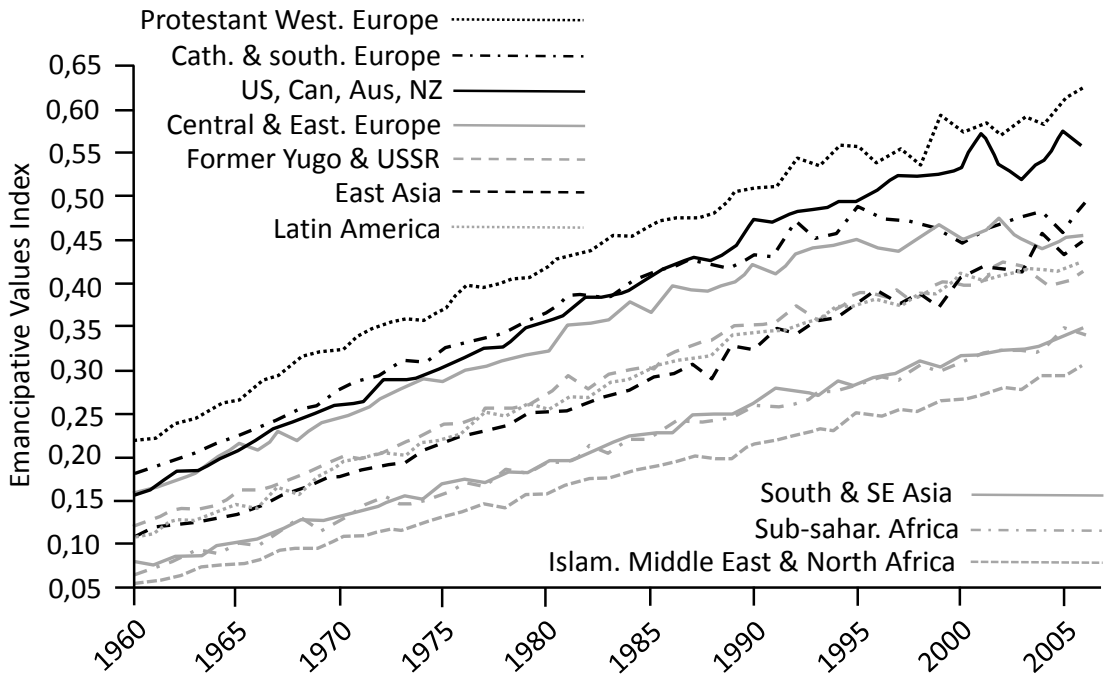
Source: Pinker 2018, figure 14-3.

Another sign of the historical expansion of sympathy and tolerance is seen by many in the dissemination of those emancipated values which were coined, by and large, during the enlightenment. The political scientist Christian Welzel has constructed an "emancipative values index", based on data from the World Value Survey. This index comprises gender equality (whether people feel that women should have an equal right to jobs, political leadership and university education), personal choice (whether they feel that divorce, homosexuality and abortion may be justified), political voice (whether they believe that people should be guaranteed freedom of speech and a say in government, communities and the workplace) and child rearing philosophy (whether they feel that children should be encouraged to be obedient or independent and imaginative)[39]. This index is on the rise on a global scale (see figure 2).

It is not very surprising that there are substantial differences between different culture zones. The protestant countries of Western Europe, such as the Netherlands and Scandinavia, are the world's most liberal, followed by Canada, the United States and Australia. The world's most illiberal region is the Islamic Middle East. For our context, the trend is more relevant than the total differences in the values. In every part of the world, people have become more liberal. For instance, young Muslims in the Middle East today are as liberal have values today that are comparable to those of young people in Western Europe, the most liberal region, in the early 1960s. These secular changes in values would be reflected in subsequent changes of constitutions all over the world – unless hindered by eternity clauses or other legal mechanisms that make it difficult or nearly impossible to change a constitution.

[39] For details, see Welzel 2013.

Figure 2: Liberal values across time (extrapolated), world's culture zones, 1960–2006



Source: Pinker 2018, figure 15-7 (based on Welzel 2013, figure 4.4)

What's the upshot of this section? The five arguments discussed above are not entirely wrong, but not as convincing as their rejoinders. As often, the truth lies somewhere in the middle. Constitutions may aggregate and cyrstallise the disparate needs, demands and aspirations of citizens at a certain point of their shared history. This is most obvious if constitutions are enacted in the rush that follows a revolution (cf. Albert 2010, 673). But decisions for rigid constitutional change mechanisms made in such constitutional moments may undermine democracy in the long run as it is the *repeated* act of deliberation, reflection and ultimately choosing that gives democracy its meaning. The 1979 revolution in Iran that overcame the 2,500 years of continuous Persian monarchy is a case in point.

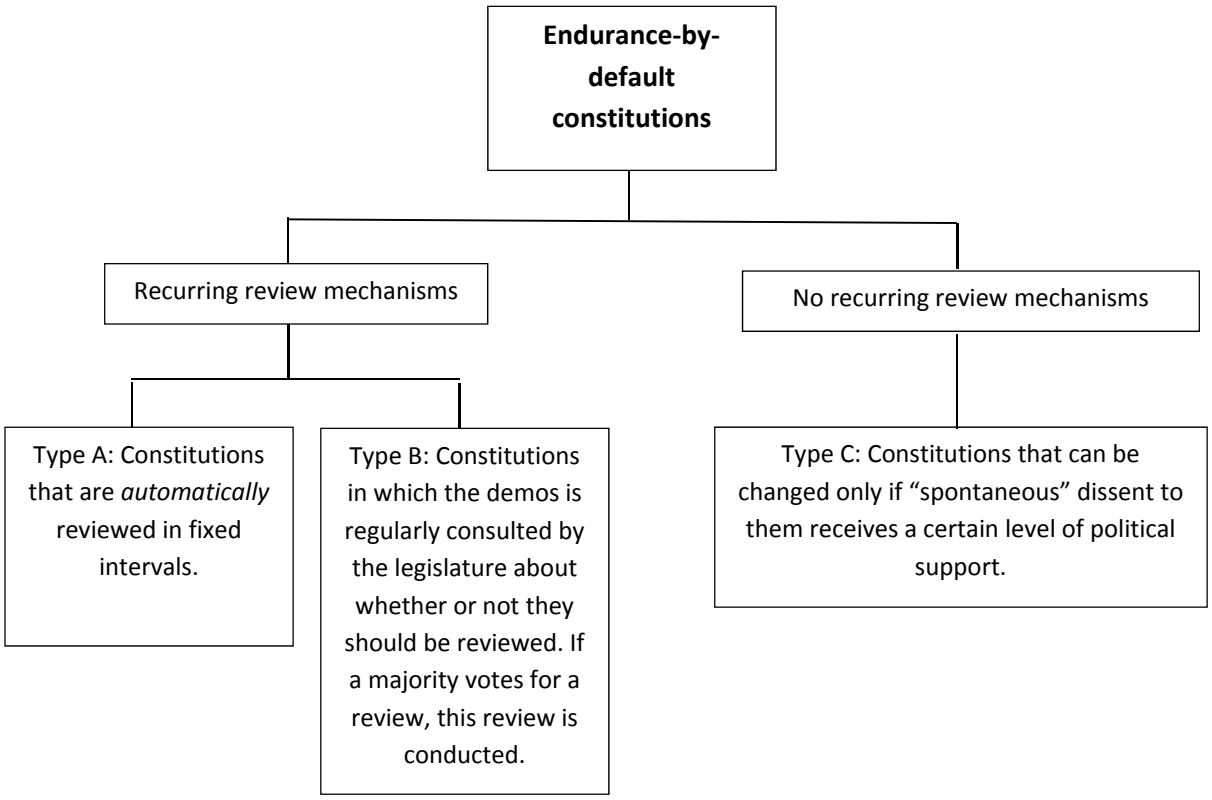
6. The proposal: recurring constitutional reform commissions

6.1. Windows of opportunities to mediate the status quo bias

What decides the endurance of a constitution: its internal design or the course of a country's history that might be more or less tumultuous? For a long time, and maybe still today, the prevailing view is that historical "shocks", such as crises, wars, disasters and the like, are the main explanatory factors for the birth of new constitutions and the death of their predecessors. In this view, their internal design – whether they have many entrenching clauses or none, or whether a four-fifths supermajority is needed for constitutional change or a two-thirds supermajority – is merely epiphenomenal. In their study *The Endurance of National Constitutions* of 2009, Zachary Elkins, Tom Ginsburg and James Melton point to the lack of empirical scrutiny: "It is possible that the general expectation regarding the power of shocks is just that, an expectation – a highly intuitive one, perhaps, but one that has not yet been empirically validated" (Elkins/Ginsburg/Melton 2009, 3).

Having analyzed each and every constitution written since 1789,[40] Elkins et al concluded that the social histories of countries are less significant than previously thought. Their central point is: design choices matter.[41] This redirects the focus of attention to the internal design of constitutions, and thus on the normative question of what a framers' generation should write into "their" constitution with regard to amendment procedures. Figure 3 shows a typology of constitutions with regard to their reformability.

Figure 3: Typology of constitutions with regard to their reformability



In both type A and B constitutions, an opportunity for reflection about the constitution is incorporated in the text of the constitution. At fixed intervals, a review has to be conducted either automatically (type A), or the demos has to be asked if such a review should be taking place (type B). There is only a small number of constitutional clauses that prescribe a predetermined, *automatic* review (type A).[42] With regard to type B, fourteen American states, possibly inspired by Jefferson, require the legislature to regularly consult the people about whether to call a constitutional convention. Eight states consult the people every 20 years; one state holds a vote every sixteen years; four states vote every ten years; and one state votes every nine years (Elkins/Ginsburg/Melton 2009, 13). The usual procedure to follow for such a state comprises four steps: (1) a decision by the

[40] Their dataset from the Comparative Constitutions Project covered the constitutional history of every independent state from 1789 to 2005, altogether 935 constitutions for more than 200 different states – the complete universe of cases, not just a sample.
[41] Elkins/Ginsburg/Melton 2009, 10.
[42] Actual examples on a national level are Micronesia's constitution (art. 12, 2) or Papua New Guinea's (art. 260). Iraq's 2005 constitution calls in art. 137 for a one-time special committee to propose amendments, a feature designed to correct errors in the initial bargaining process.

state legislature to submit the question of calling a convention; (2) a favourable vote by the citizenry of this state; (3) passing legislation for the election of delegates for the convention and the funding of this event; (4) the election of the delegates. Only then, the convention can *start* its work. In his article about the history and the use of this model, Martineau (1970, 422) has compiled the following figures: fifteen states had at some time in their history a mandatory referendum requirement on calling a state constitutional convention; a convention vote has been called 72 times, 29 times successfully. As a result, 21 constitutional conventions have been held. Eight conventions have not been held because of resistance from the incumbent government respectively legislature. In effect, the "consult the demos" clauses in type B constitutions prove quite difficult to execute in practice.[43] Constitutions that have a clause for *automatic* review at fixed intervals (type A constitutions) obviously need just one decision-making by the people, not two like the type B constitutions. In countries where a referendum decides upon changes to the constitution, the mechanism of type A constitutions leads to just one vote of the people: on the amendment proposal of the reform commission after it has completed its work.

Type C constitutions lack any of the described mechanisms for recurring review. But constitutions should prescribe a time for its own revision. This would make the voices of succeeding generations heard from time to time by opening a window of opportunity. If a constitution is too difficult to change, the dead wield power over the living, and the past rules over the present.[44] Elkins, Ginsburg and Melton draw an interesting analogy: "The return to the well of contemporary popular sovereignty is mirrored in the periodic ritual of elections. The critical difference is that elections renew the personnel that fill government posts, not their powers or even the existence of the post themselves. Many states have adopted limits on the number of terms that a representative can serve, responding to popular frustration with the advantages of the incumbency. Like expiration dates for laws, limits on terms strike a difficult balance between two threats of representation: the inertial power of the status quo and the illiberalism of forbidding the continuation of the status quo. [...] Presumably, Jefferson contemplated only a new round of deliberation, not one that would have prevented the electorate or their delegates from sustaining the old constitution by popular acclaim" Elkins/Ginsburg/Melton 2009, 14). No matter which interpretation of Jefferson's writings is correct, sunset constitutions would indeed be indefensible, but "endurance-by-default" constitutions with recurring reform commissions are a different matter altogether.

How long should the fixed time intervals between two succeeding commissions be? In the context of constitution-making, "generations" are not conceived of as unified actors but just as cohorts. Assuming the demographic data are available, one can calculate the point in time at which the post-framers' generation has become as numerous as the framers' generation ("generational change point") for each country and each base year. Based on the variables a) *number of eligible citizens in a base year x (=framers' generation)*, b) *citizens reaching the voting age in the years x+1, x+2, ..., x+n;* and c) *deaths of framers' generation members in the years x+1, x+2, ..., x+n*, one arrives at different time periods until the next generational change point for each country, depending on its population

[43] Note that the aim of the US states' clauses, described above, seems to be rather the adoption of a new constitution than a revision of the existing one. Here, the differences between a *reform commission*, as proposed in this article, and the American state mechanism to achieve a *convention*, as it exists in 14 US state constitutions, become apparent.

[44] More precisely, those who were of voting age at the time the constitution was adopted bind those who were not of voting age then because they were too young, and those not even born, at that point in time.

structure and the minimum voting age.[45] Mathematical calculations for each country could follow here. To cut a long story short, I take *25 years* as a good length of time between two constitutional reform commissions.

To be very clear: A constitutional reform commission is not a constitutional convention. The mandate of the latter would be to draft a new constitution of a piece, a monolithic and integral new document. In a way, constitutional conventions found a country anew. A reform commission, on the contrary, has the task of making proposals for the adoption/change/abolition of single clauses. This excludes the danger that a generation could end up without any constitution at all. My proposal is more in line with Condorcet's proposals than with Jefferson's.[46] The recurring reform commission proposed here, once it has been convened, will need less time than a convention would need. Arguably, it should not sit for more than one year before making a proposal.

Imagine that twelve reform commissions were installed in 300 years, each one presenting a proposal to the contemporary people. If this would be regarded as a normal course of events, then no one would call it a failure if some of these twelve reform commissions presented only minor proposals, or if one citizenry would not adopt the proposals of "their" generation's reform commission. Each time the citizenry would still have had their say.

It is very likely that such a flexible mechanism for constitutional change would increase the endurance of the very constitution. One of Elkins et al.'s key findings is that flexibility (defined as the constitution's ability to adjust to changing circumstances captured in the empirical analysis by the ease of formal and informal amendment, either informally via constitutional construction by the courts or via formal amendment procedures by the legislature) is positively correlated with the endurance of a constitution (Elkins/Ginsburg/Melton 2009, 76). Likewise, the inclusiveness of a constitution (defined as the degree to which the constitution includes relevant social and political actors taking into account that time will change which societal groups will have a stake in the endurance of the constitution) is positively correlated with its stability over time. The life expectancy of the least inclusive constitution is a full 55 years less than the most inclusive constitution (14 years v. 69 years).

The finding that flexibility increases endurance can be made plausible by two thought experiments.

> As a first thought experiment, let us imagine that in a newly formed nation a constitutional convention adopts a constitution. In this constitution, the very last provision stipulates that no single clause of the constitution be changed or abolished for a time period of 300 years. After that time period, constitutional changes are possible by a supermajority of 75% of the members of parliament.

[45] If migration is factored in, the variable "*naturalised immigrants (above the voting age) in the years x+1, x+2, ..., x+n*" adds to the part of the population who are citizens of a country without having had the chance to consent to the constitution. But one can argue that by applying for naturalisation, these people have consented to the constitution of their new home country. I am very grateful to Jürgen Dorbritz (Scientific Director of the Federal Institute for Population Research of Germany) for thoughtful discussions about this question.

[46] Condorcet proposed a national assembly, convened by the legislative body, to deliberate possible modifications of the constitution (Condorcet 1874). He did not plead for sunset constitutions.

In this scenario, the framers of a constitution impose their will on subsequent generations and leave an immovable imprint for a limited, but quite long time period. Those born in the next three centuries are expected to acquiesce to the norms of this constitution without their consent.
Here is a second, slightly changed version of the thought experiment.

> In another nation, the framers of a newly-formed constitution install a review provision which stipulates that, instead of leaving all constitutional clauses unchanged for 300 years, each generation can have a reform commission and revise the constitution, albeit without changing its general spirit. It further stipulates that after 300 years the whole constitution can be replaced by a completely new document if the then-demos decides to do so.

Which constitution is more likely to be repealed entirely after 300 years: the one with the 300 year-old content due to the entrenched embargo by the framers' generation, or the one that has been updated by each generation (who wanted to do this) in the last 300 years? In the first scenario, the citizens have been hindered from exercising the *pouvoir constituant* for a long time, whereas in the second scenario no generation was shut out of their project of constitutionalism. Even if not all installed review commissions actually did lead to amendments, all generations have had their say. In this second version of the thought experiment, 300 years after the initial formulation of the constitution a revolution will be unnecessary, given that an evolutionary process (in the form of amendments) has taken place.
In Bruce Ackerman's influential account of constitution-making, constitutional amendment is the upshot of a slow-motion and spontaneous process whereby activists manage to place certain requests on the constitutional agenda, which results in increasingly intense popular engagement and deliberation and, if successful, in a change of the constitution (Ackerman 1991). Presumably, the worry is that, if this incremental process is omitted by externally mandating that a constitutional commission with the ability to set the agenda for reform be regularly set up, the upshot of the amendment process, even if supported by majority vote, might lack the deliberative and participatory pedigree that renders democratic constitutions particularly legitimate.[47]
The difficulty of constitutional amendments is in line with Ackerman's (1991, 6) concept of a dualist democracy: "Decisions by the People occur rarely, and under special constitutional decisions. Before gaining the authority to make supreme law in the name of the People, a movement's political partisans must, first, convince an extraordinary number of their fellow citizens to take their proposed initiative with a seriousness that they do not normally accord to politics; second, they must allow their opponents a fair opportunity to organize their own forces; third, they must convince a majority of their fellow Americans to support their initiative as its merits are discussed, time and again, in the deliberative fora provided for 'higher lawmaking' [...]. Decisions made by the government occur daily, and also under special conditions. [...] Even when this system of 'normal lawmaking' is operating well, however, the dualist Constitution prevents elected politicians from exaggerating their authority. They are not to assert that a normal electoral victory has given them a mandate to enact an ordinary statute that overturns the considered judgments previously reached by the People. If they wish to claim this higher form of democratic legitimacy, they must take to the specially onerous obstacle course provided by the dualist Constitution for purposes of higher lawmaking."

[47] I am grateful to an anonymous reviewer who raised this point.

While I do not dissent from the idea that constitutions should be more difficult to change than ordinary laws, I do not take this premise to imply that the bar should be raised extremely high for reformers. How homogenous is the "We" in "We the People", after all? If it is usually quite inhomogeneous, then what is the best way to deal with this inhomogeneity? With regard the US constitution, Ackerman acknowledges the selectivity of the activists in 1787/1789.[48] Why should the vote of the now-deceased activists that managed to frame a constitution count way more than the vote of the activists of today? And can we simply presume that earlier generations' views still find support among the contemporary "We the People"? At this point of the discussion, it is time to take a closer look at a key concept here that has been ignored so far: tacit consent.

6.2 What kind of consent is "tacit consent"?

The "tacit consent" concept implies that as long as there is no voiced and open opposition by a majority against a constitution (or some of its clauses), it enjoys the support of the demos. Those who don't articulate their dissent are counted as supporters for the status quo.[49] John Locke was one of the classical proponents of the idea that individuals as free agents enter into consensual relationships with other free agents, and that this becomes the basis for political governance. As approval to this contract is not voiced explicitly, Locke adds the notion of tacit consent.[50] Michael Otsuka (2003, 95-105) specifies the Lockean argument for tacit consent by adding that tacit consent can be presumed only when an individual has a realistic opportunity to exit the political society in which he is currently residing.

In the history of legal thought, the argument of tacit consent has often been invoked. It seems to provide a splendid justification for leaving constitutions unchanged for very long periods of time. However, tacit consent as an argument might not reach all that far.

In a pluralistic society, you never have unanimous support for a constitution. There are always some dissenters who want to change this or that constitutional provision. In practice, tacit consent is a *gradual* concept. Leaving aside those who flee the country, because they don't want to live under certain constitutional provisions any longer, and leaving aside those who express open dissent with some constitutional provisions, you have a lot of people who are silent. Whether this is a majority or a minority is not revealed as long as there is no decision-making on the agenda. It is thereby important to understand that the failure of *success* of the open dissenters is not a criterion of the legitimacy of certain constitutional provisions. Let's imagine a constitution to be changeable by direct rule of the people, that is: referenda without parliamentarian intervention, by a supermajority of

[48] "When Madison and the rest drafted the Constitution in the name of the people, they spoke for a million white male planters and merchants, farmers and mechanics, who were just beginning to assert the independence of the Eastern Seaboard." (Ackerman 1991,35).

[49] For a comprehensive account of different kinds of consent, see Simmons 1979, 75-100.

[50] "There is a common distinction of an express and a tacit consent, which will concern our present case. Nobody doubts but an express consent of any man, entering into any society, makes him a perfect member of that society, a subject of that government. The difficulty is, what ought to be looked upon as a tacit consent, and how far it binds—i.e., how far any one shall be looked on to have consented, and thereby submitted to any government, where he has made no expressions of it at all. And to this I say, that every man that hath any possession or enjoyment of any part of the dominions of any government doth hereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as any one under it, whether this his possession be of land to him and his heirs for ever, or a lodging only for a week; or whether it be barely travelling freely on the highway; and, in effect, it reaches as far as very being of any one within the territories of that government" (Locke 1823, "Essay Two," chap. VIII, § 119, p. 157).

75%. Assume, for the sake of argument, that a lot of citizens are unhappy with one clause in the constitution, the right to bear arms in public. Let's assume the dissent varied in the past one hundred years, ranging from 67% to 74%. The dissenters in this scenario would in all these years be unsuccessful in abolishing this clause; but it would be false to say that the clause enjoyed "the tacit consent of the people". But to claim that constitutions generally do not enjoy the support of the citizenship would also be inaccurate. What is correct is that there is constant call for reform which sometimes becomes louder, sometimes less loud, but never ceases. And even if the government tries to silence it, as is often the case in authoritarian regimes, it is still there. The desire of a part of a nation's citizenry to modify their constitution as they learn about unintended, unexpected and unwanted consequences is ubiquitous in a globalised and interconnected world.

Let's apply Ackerman's argument to two peoples and their constitutions: the US Americans and the Norwegians. In the US, only a very low number, 27 proposals, have been ratified and became part of the Constitution. The first ten amendments were adopted and ratified simultaneously and are known collectively as the Bill of Rights. Counting the Bill of Rights as *one* change, the US Constitution has experienced only 18 changes in 230 years. In comparison, the Norwegian constitution, also one of the oldest in the world, has been changed 200 times since it came into existence on 17 May, 1814.

As mentioned, article 5 of the US constitution sets a very strict change mechanism for the rest of the US constitution's provisions. In comparison, Norway's constitution has only moderately strict amendment procedures. And, for good reasons, the amendment clause of Norway's constitution[51] brings "experience" into play ("If experience shows that any part of this Constitution of the Kingdom of Norway ought to be amended,...").

There is no evidence that succeeding generations of the American people may be less inclined to change the constitution than succeeding generations of Norwegians. In the US, individual members of the House and Senate *propose* around 90 amendments each year.[52] The reason outdated provisions in the US constitution[53] are not changed is not that the contemporary American people still supports them, but that reformers lack windows of opportunity to mobilise the silent

[51] Article 121 (Constitution amendment procedure): "If experience shows that any part of this Constitution of the Kingdom of Norway ought to be amended, the proposal to this effect shall be submitted to the first, second or third Storting after a new General Election and be publicly announced in print. But it shall be left to the first, second or third Storting after the following General Election to decide whether or not the proposed amendment shall be adopted. Such amendment must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution, and such amendment requires that two thirds of the Storting agree thereto."

[52] 11,699 measures have been proposed to amend the Constitution since 1789 (counted up to 3 January 2017). See https://www.senate.gov/pagelayout/reference/three_column_table/measures_proposed_to_amend_constitution.htm

[53] One example for an outdated provision in the US constitution is the process for electing the US president commonly known as the Electoral College. The 12th amendment is seen by many scholars as an institution that should be reformed or abolished, see e.g. Levinson 2006. Already in 2000, the candidate with the plurality of votes, Al Gore, was prevented from becoming president by this constitutional provision. The 2016 presidential election again pointed to the problems of this institution. It allowed Donald Trump to become president without the support of the plurality of the voters, as Hillary Clinton had received 48 % of the vote, Donald Trump 46 % and others around 6%. Clinton received almost three million votes more than Trump, which is a substantial margin. The Electoral College currently employed in the USA is an institution that might have had some credibility in 1787, before most people became literate, and before the formation of modern political parties, but circumstances have changed since then.

(super)majority against them. The activists and pressure groups arguably act quite alike in the US and in Norway, but the variable "constitutional design" makes the difference.

Many scholars have pointed to the cognitive phenomenon called the status quo bias (Samuelson/Zeckhauser 1988; Sunstein 2000). Political institutions are sticky because human-beings are rule-following animals by nature. They are biased in favour of the social norms that already exist. This gives an anthropological explanation for the odd fact that constitutional clauses survive even when the conditions for which they were once created have obviously disappeared long ago. Ackerman's account of constitution-making does not give enough weight to the difficulties of re-deliberation. In fact, "we are endowed with a status quo bias that causes us to stick with earlier choices, often without conducting a full evaluation of the merits" (Elkins/Ginsburg/Melton 2009, 14). There is thus no even playing field for those who want to abolish outdated and problematic constitutional provisions and those who want to keep them, even if the former group is a (super)majority. Inertia plays into the hands of the existing system despite the fact that time goes on and the world changes constantly. This is why recurring review mechanisms are needed. They are a flexible and inclusive tool that can be employed to keep old constitutions young.

Provided the reform commission, as described above, makes a proposal for a more or less extensive revision of the constitution, how should it be ratified? I see no reason to stray away from the usual amendment procedure laid out in the constitution. The way a constitutional provision can be "challenged" in normal times (outside the window of opportunity of a reform commission) varies significantly from state to state. Supermajorities in parliament, referenda and intervening elections (confirmation by a double vote) are the most common amendment rules. In some countries, a minimum number of MPs is needed to trigger the procedure of constitution-amending. In some countries such as Switzerland, it can be triggered by popular initiative (for classification schemes of constitutional change procedures, see Rasch/Congleton 2006, 328-30; Elster 2000, 101; Lane 1996, 144). The proposal of the reform commission should be covered by the normal amendment rules. In fact, if an extra amendment procedure for the proposals of the reform commission would be established, the key idea would get lost. The reform commission should overview the reform requests that have been voiced by experts and citizens alike. It should crystallise popular engagement and deliberation.[54]

7. Defusing the debate on the role of constitutional courts

The debate on the role of the judiciary in models of separation of powers and on the legitimacy of decisions by constitutional courts that overrule decisions by the legislative is extremely wide-ranging and cannot be addressed here in its entirety. Nevertheless, it is worthwile to briefly point out that the proposal propagated here would defuse this debate. "Whoever gave Nine Old Layers authority to overrule the judgements of democratically elected politicians?" asks Ackerman (1991, 8) rhetorically.[55] However, there is also much to be said for the position that a nation does not necessarily benefit when constitutional judges impose judicial self-restraint on themselves. It may

[54] As mentioned, the reform commission recurs rarely, e.g. every 25 years. Of course, the revision of constitutional provisions remains possible in the midst of such an interval (i.e. "spontaneously") by the established amendment procedure as well.

[55] Explicit criticisms of the power of the Supreme Court or of constitutional courts as a whole can be found in Hirschl 2004; Kramer 2004; Tushnet 1999 or Waldron 2001.

make sense from an overarching perspective for proven legal experts with the possibility of quiet, confidential deliberation to see it as their role to question all decisions of the legislature that might violate any single clause of the constitution. Rosanvallon (2011) calls it a misunderstanding when constitutional courts are accused of being directly responsible to no one and their existence undermines the principle of popular sovereignty. In his historical analysis, he emphasizes that independent institutions must be regarded as a fundamental part of democracy as a form of government. Even in classical Athens they were regarded as a necessary correction of the majority principle. Only if a democracy recognizes the risk of its own dysfunctionality and establishes appropriate counterweights can it function in the long term (Rosanvallon 2011, 74). With regard to constitutional courts, it can be inferred from this that they are an indispensable part of a more complex understanding of democracy.

The case of judicial restraint (or the opposite, judicial activism) cannot be decided here. Rather, it should only be pointed out here that the model of "constitutional reform commissions in the generation cycle" would defuse this bitter debate. Those who call themselves representatives of people's sovereignty could rely on each newly composed demos having a realistic chance to sufficiently systematically redefine the constitutional norms under which they live. Those who call themselves constitutionalists can rely on the fact that the times at which the demos takes the constitution and thus the formation of the rules of the game into its own hands are rare and far apart.

8. Conclusion and Outlook

So far, this essay has hopefully convincingly made the following points: A constitution is not a sacrosanct holy scripture. All generations should grant their successors the basic sovereign right of continuing self-definition. Every constitution-maker, our generation as much as previous and future generations, should conceive of a constitution not only as a segment of being, but also as a process of becoming. The initiation of recurrent review mechanisms is the touch-stone if we are willing to take generational sovereignty serious.

The tension between rigid constitutionalism and participatory democracy can never been fully resolved. But it can be lessened. As Albert (2010, 705) writes: "Resolving the tension between them will require, first, building on their respective strengths and compensating for their respective weaknesses and, second, fashioning a constitutional structure that will make real the promise that both hold for humanity." A constitutional reform commission at fixed time intervals implies a clear rejection of the two ends of the continuum, namely, sunset constitutions and perpetual constitutions; it is a mechanism that strikes a good balance between the necessary rigidity and flexibility of constitutions.[56] Some distinct features of such reform commissions (periodization of this specialized body[57], length of session, treatment of the results) were already discussed. But one

[56] This new balance between constitutionalism and democracy is already quite familiar to the traditions of some peoples but not for others. There is a paradox here: those states that would need the safety valve of mandatory constitutional reform commissions the most are also those least inclined to put it in their constitutions.

[57] As mentioned, there can be a mathematical calculation for time period, using the demographic structure of a country. But if this is deemed too complicated, a people could just agree on a suitable number, for instance 25 years. In the historic blueprint for regular reform commissions, the Girondin Constitutional Project, Condorcet

question is spared out deliberately: *By which mode should the members of the commission be selected or elected?* The composition of the commissions is rather an intragenerational than an intergenerational topic. Given the great variety of legal and political traditions in constitutionalised democracies and non-democracies around the world, it seems appropriate to conceive differently of such a reform commission for each country. There cannot be a "one-size-fits-all" approach. It would be presumptuous to propose the same design for recurring constitutional reform commissions for countries as different as, say, Iran and the USA. Path dependencies might limit the range of feasible solutions. One option might be the election of delegates, as in American constitutional history. One other option might be choosing citizens by lot, placing ordinary citizens at the forefront of the process.[58] In fact, there have been some intriguing examples for that approach in Iceland and in British Columbia (Landemore 2015; Warren/Pearse 2008). But expert commissions could also have their advantages. After German Reunification, the Joint Constitutional Commission, which was composed solely of members of the Bundestag and Bundesrat, completed the amendment process successfully. Here, members of the legislature, among them many law experts, were allowed to propose specific constitutional amendments.[59]

Providing the individual answer to "the selection question"[60] is very much a national project – it could even be "the constitutional project" of the current generation of citizens in each country in which the institution of a constitutional reform commission has yet to be established. It is, after all, "their" constitution. They are the "selves" in the term "constitutional self-determination." The now-deceased forefathers can neither be benefited by possessing something, nor harmed by losing a property, including the capacity to rule after their death. "The vanity and presumption of governing beyond the grave, is the most ridiculous and insolent of all tyrannies." (Paine 1998, 91).

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and his co-authors were not unambiguous about the time span either, mentioning both twenty and ten years as options, see Condorcet 1847, 244.

[58] González-Ricoy (2016b) lists some criteria for civil society reform commissions whose members are appointed by lot, among them: a) The amendment is drafted by a convention called for that purpose and constituted by members of civil society (rather than by members of parliament, who may have electoral or partisan motivations); b) To improve descriptive representativeness, some seats are reserved for members of minorities; c) Members of the convention receive ongoing technical and legal advice.

[59] This was a commission that was brought about by special historic circumstances, as the German Basic Law does not yet speak of *recurring* constitutional commissions.

[60] For related questions with regard to constitution-making assemblies, see Elster 2012: 16.

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